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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1086

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,
PETITIONER,

v.

LEONARD A. KIERNAN, JR.,
PUBLIC ADMINISTRATOR,
and
FRANCIS J. MAGUIRE,
PUBLIC ADMINISTRATOR,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR RESPONDENT, LEONARD A. KIERNAN, JR.

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BRIEF FOR RESPONDENT, LEONARD A. KIERNAN, JR.

Respondent Kiernan prays that the petition for writ of certiorari to review the judgment of the Rhode Island Supreme Court rendered on November 7, 1967 in the case of Martin Malinou, Public Administrator v. Leonard A. Kiernan, Jr., Public Administrator, be denied.

Opinions Below

These are as set forth in Petitioner's Brief. The Rhode Island Superior Court did not render a decision but did certify the matter to the Rhode Island Supreme Court on an agreed statement of facts.

Jurisdiction

The jurisdiction is set out in the Petitioner's Brief at page 2.

Question Presented

Was the Supreme Court of Rhode Island correct in its decision to deny and dismiss the appeal of the petitioner?

Statement

In view of the fact that there is an Agreed Statement of Facts (R. 101-104) and the statement set forth in Petitioner's Brief (page 12 et seq.), it is necessary to make only a few observations. The appointment of Kiernan as public administrator was never challenged or appealed by Malinou. Malinou was public administrator from January, 1961 to January, 1963 (R. 101). Gallagher, the former public administrator, never paid the $10. fee, (R. 101) and deceased September 14, 1962 (R. 103). It was not until November 10, 1964, when Kiernan was public administrator, that Malinou filed a petition to be appointed administrator d/b/n of the Cumber Estate (R. 103).

Respondent Maguire has attempted no further review since his Motion to Intervene was denied by the Supreme Court of Rhode Island in its opinion (R. 176).

Argument

The Supreme Court of Rhode Island rendered the correct decision on the facts of the case which involves solely a local matter and is not a federal question warranting the issuance of a writ of certiorari.

I.

The Writ of Certiorari Should Not Be Granted.

The petitioner argues the opinion of the Rhode Island Supreme Court is not clear in that there is no determination on Respondent Maguire's Motion to Intervene. The Respondent Kiernan says a plain reading of the opinion makes it clear that the motion is denied. (R. 176).

> "We now hold, therefore, that even though an appointee to the administratorship of a particular estate ceases to be public administrator, he does not thereby resign or forfeit the administratorship of the particular estate, but remains the administrator thereof until he is discharged or his letters are revoked for cause. In our opinion, the intervenor, therefore, is not entitled to letters of administration on this estate so long as the appellee remains the administrator of that particular estate. We conclude, therefore, that the letters of administration for the Cumber Estate properly issued to the appellee, who, as the administrator thereof, is entitled to administer that estate according to law, and that the appeal of the appellant be denied and dismissed."

II.

THE RHODE ISLAND SUPREME COURT CORRECTLY DECIDED THAT THE PAYMENT OF THE $10. FEE WAS NOT A CONDITION PRECEDENT TO QUALIFICATION FOR THE OFFICE OF PUBLIC ADMINISTRATOR (R. 173).

The Statute of Escheats, Section 33-21-12, 33-21-15 does not repeal the city council's power to elect a public administrator. Statutory construction makes it clear that special legislation is not affected by general enactment unless the intent to do so clearly appears. *Langdeau* v. *Narragansett Insurance Co.*, 94 R.I. 128, 133.

> "In this connection it is significant that in enacting the Uniform Insurers Liquidation Act the legislature failed to include therein the usual concluding omnibus section providing that 'all acts and parts of acts inconsistent herewith are hereby repealed' ".

III.

ARGUMENT THREE IN THE PETITIONER'S BRIEF DEALS WITH THE CONCEPT THAT ONCE HAVING BEEN PUBLIC ADMINISTRATOR THAT THERE IS CREATED THEREBY A PROPERTY RIGHT.

The case of *Malinou* v. *Rosedale*, 197 A.2d 289, 291, another case in which the instant petitioner was involved, sets forth language of a California case as follows:

> "Perhaps this view is stated completely and clearly in *Whelan* v. *Bailey*, 1 Cal. App. 2d 334, at page 337, 36 P.2d 709, at page 710 where that court said: 'While the public administrator has a certain public function, in that the state is interested in seeing that someone takes charge of property which is more or less with-

> out a guardian, in the performance of his duties he exercises what is essentially a private function, in that he is the personal representative of the deceased, handling the estate for the benefit of the heirs. He obtains his right to so act not by virtue of his office, but by grant of power from the court, his office merely giving him the right to obtain such a grant of power from the court under certain circumstances.' "

In that case the Rhode Island Supreme Court refused expressly to pass on this point although saying it was sound law. In the instant case they did pass upon it expressly holding "We now hold, therefore, that even though an appointee to the administratorship of a particular estate ceases to be public administrator, he does not thereby resign or forfeit the administratorship of the particular estate, but remains the administrator until he is discharged or his letters are revoked for cause". (R.176).

IV.

Petitioner's Reasoning in Argument Four Is Somewhat Difficult To Follow as He Couples Failure To Pay the Ten Dollar Fee by Kiernan With the Case of *Robbins* v. *Tafft*, 12 R.I. 67. *Robbins* Is a Very Brief Opinion, Which Merely Seems To Say That an Application to a Probate Court Need Not Be in Writing as to Jurisdiction.

The petitioner's contention posits something which does not appear to be correct as to the payment of the ten dollar fee. The requirement to pay the ten dollar fee the Rhode Island Supreme Court ruled was not a condition precedent to qualification for the office of public administrator. It is difficult to see how petitioner can validly argue that he has been denied equal protection under the law because

he paid ten dollars, which payment the court ruled was not a condition precedent to qualification. The basis under which petitioner claims *Robbins* v. *Tafft,* 12 R.I. 67 has been overruled is completely unclear, apparently by reference to an unreported case, *Estate of Mary Schaufelberger.*

As to petitioner's Question II.

As set forth earlier in this brief this cause was certified by a Justice of the Superior Court to the Rhode Island Supreme Court on an agreed statement of facts. The petitioner apparently now seems to take the position that he has been denied procedural due process by claiming the Rhode Island Supreme Court should have sent the case back to the Superior Court so petitioner could adduce proof to show other facts. The record is clear in the agreed statement of facts that Gallagher died in September, 1962 (R. 103) when Malinou was public administrator (R. 101), and that it was not until November 10, 1964 (R. 103) that Malinou filed a petition seeking letters of administration, on which date Respondent Kiernan was public administrator. (R. 102)

Re: Petitioner's Question VI.

The petitioner cites *Malinou* v. *Cairns,* 231 A.2d 785, in which this Court denied certiorari, for the proposition that since he applied first for letters of administration in the Cumber Estate, that he thereby had a right to administer as against Respondent Kiernan. This ignores the plain fact that there were heirs in the *Cairns case* and that a petition had been filed on behalf of such *heirs.*

Conclusion

For the foregoing reasons the Respondent Kiernan respectfully requests that this Court deny the petition for a writ of certiorari to the Supreme Court of Rhode Island.

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February, 1968.